[2014] UKUT 0340 (TCC)

Reference number: FS/2014/0006

FINANCIAL SERVICES – procedure – application to make reference out of time – whether Tribunal satisfied that in all the circumstances application should be granted – yes –Rule 2 and Schedule 3 Paragraph 2(2) Tribunal Procedure (Upper Tribunal) Rules 2008

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

JAVIER MARTIN-ARTAJO **Applicant**

- and -

THE FINANCIAL CONDUCT AUTHORITY **The Authority**

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public in London on 16 June 2014

Jonathan Hall QC, instructed by Norton Rose Fulbright LLP, for the Applicant

Paul Stanley QC, instructed by the Financial Conduct Authority, for the Authority

DECISION

Introduction

1. This decision relates to an application by the Applicant ("Mr Martin-Artajo") to make a reference to this Tribunal out of time in respect of his contentions that he was identified in a decision notice given by the Authority to JP Morgan Chase Bank NA ("JPM") on 18 September 2013, that the reasons contained in the notice are prejudicial to him and that he should have been given a copy of the notice.

The Facts

2. There is no dispute on the facts regarding how it was that Mr Martin-Artajo's reference was filed 4 months and 22 days after the expiry of the 28 day statutory time limit. In that regard I had a witness statement from Ms Lista Cannon, a partner in Norton Rose Fulbright LLP who has conduct of the proceedings at that firm on behalf of Mr Martin-Artajo, which exhibited correspondence and other documents relating to the issue. Ms Cannon's evidence was unchallenged. The Authority submitted no evidence of its own.

3. From the material submitted I make the following findings of fact.

4. Mr Martin-Artajo was head of EMEA Credit and Equity Trading for JPM in London between 2007 and July 2012 and managed the Synthetic Credit Portfolio ("SCP") in JPM's Chief Investment Office. As a result of large trading losses within the SCP its activities were investigated both in the United Kingdom and the United States. JPM agreed to a settlement with the Authority following the conclusion of the Authority's investigations which resulted in JPM accepting a financial penalty of £137,610,000. A Final Notice addressed to JPM imposing this penalty and setting out in full the facts and matters relied on and the reasons for the decision was published on 19 September 2013.

5. In the meantime, Mr Martin-Artajo had been made the subject of an investigation by the Authority as to his own personal conduct in respect of the management of the SCP, the investigation being opened in August 2012.

6. Mr Martin-Artajo made it clear at an early stage of the Authority's investigation that he was prepared to co-operate fully with the investigation and provide all necessary information. Mr Martin-Artajo wished to use the investigation as an opportunity to explain his actions and rebut any criticisms of misconduct and his lawyers assessed that he was being afforded the opportunity of participating in a fair and balanced regulatory procedure being undertaken by his primary regulator.

7. In October 2012 in the context of civil proceedings brought against him by JPM Mr Martin-Artajo issued a statement, which was reported in a number of sources, to the effect that he was confident that when "a complete and fair reconstruction of these complex events is completed, he will be cleared of any wrongdoing". This statement was repeated in August 2013, after a period during which he had been interviewed by

the Authority in the course of its investigation and was awaiting further developments on the investigation.

8. It is clear that Mr Martin-Artajo saw the Final Notice upon it being published on 19 September 2013. It was also clear that at that stage Mr Martin-Artajo advised by his lawyers, took the view that he had been identified in the Final Notice (on the basis that references in the Final Notice to "SCP Management" were in fact references to him personally) and that the references were prejudicial to him as they included allegations that SCP Management was responsible for instructing SCP employees to engage in mismarking. It is also clear that he knew that if that were shown to be the case he should have been given the right to make representations to the Authority before the decision notice that preceded the Final Notice was issued by virtue of section 393(3) of the Financial Services and Markets Act 2000 ("FSMA"), and that not having been the case (the Authority taking the view that Mr Martin-Artajo was not identified in the Final Notice) he had a right to refer the matter to this Tribunal pursuant to section 393(11) FSMA (as set out in paragraph 29 below).

9. It is also clear that Mr Martin-Artajo knew that the 28 day time limit for filing a reference to his Tribunal in those circumstances had commenced on publication of the Final Notice on 19 September 2013.

10. On 15 October 2013, just before the expiry of the 28 day time limit, Ms Cannon wrote to the Authority in the following terms:

> "We refer to the Notice of Appointment of Investigators dated 13 August 2012 and the compelled interviews of our client, Javier Martin-Artajo, by the FCA on 15, 16 and 25 April 2013.
>
> In light of the FCA's Final Notice to JP Morgan Chase Bank, NA, dated 18 September 2013, we would be grateful for an update in relation to your proposed timetable for the progression of the FCA's investigation with respect to Mr Martin-Artajo."

I observe there was no reference in this letter to the fact that Mr Martin-Artajo contended that he had the right to make a reference.

11. On 18 October 2013, Ms Howard of the Authority contacted Norton Rose Fulbright by telephone and informed them that the Authority was not in a position to provide a specific update but confirmed that they were progressing the investigation and could not indicate when they would be in a position to advise of the next steps in the process.

12. It was clear at this stage, as Ms Cannon said in her witness statement, that Mr Martin-Artajo took the view that he would in due course have the opportunity of responding to the allegations against him personally in the investigation. He therefore took the deliberate course, on the advice of Ms Cannon, of not filing a reference before the expiry of the time limit on the basis that it would have been an inappropriate use of time and resources (for both parties) to have made an immediate reference. Ms Cannon's evidence was that if the Authority had indicated that at that time it was contemplating or proposing to discontinue the investigation, then a

reference would have been made at that time, but that it would be premature to do so whilst the investigation continued.

13. On 29 November 2013 Ms Cannon wrote to the Authority, stating that it being apparent that the Final Notice made certain findings against Mr Martin-Artajo, then as a matter of fundamental fairness Mr Martin-Artajo would like to request the provision to him of the basis of the Authority's preliminary findings in connection with his alleged conduct.

14. Although I accept that this letter implies that the Final Notice contained statements about Mr Martin-Artajo personally to which he took exception, the letter did not refer specifically to the fact that in the circumstances he would have the right to make a reference.

15. The Authority, through Ms Howard, did not respond directly to this letter but wrote to Ms Cannon on 16 December 2013 in the following terms:

> "As you are aware, the FCA has been conducting an investigation of Javier Martin-Artajo under section 168(5) of the Financial Services and Markets Act 2000 (FSMA).
>
> I refer to the proceedings brought against him in the United States by the US Department of Justice and the US Securities and Exchange Commission. In light of those on-going proceedings and having regard to all relevant circumstances, the FCA has decided to discontinue its investigation against him and has no present intention to take action in relation to the matters referred to in the Memorandum of Appointment of Investigators dated 8 August 2012. However, to be clear, this decision does not mean that the FCA has concluded that Mr Martin-Artajo's conduct, complied with the standards expected of him under the law and applicable regulatory regime.
>
> The FCA reserves the right to take further action, including reviewing this decision and to re-start its investigation at any stage if it considers it appropriate, in particular once the outcome of the US proceedings referred to above is known. If the FCA re-starts its investigation it will give your client written notice."

16. We accept Ms Cannon's evidence that this letter was sudden and unexpected in the context of the earlier correspondence and where there was no indication that there had been any change in circumstances, the US proceedings having been underway at the time of the previous correspondence.

17. Ms Cannon replied to this letter on 23 December 2013 in the following terms:

> "We are disappointed that the FCA has decided to discontinue its investigation without providing our client with an adequate opportunity to respond to certain findings which are evidence from the FCA's Final Notice to JP Morgan Chase Bank, N.A. dated 18 September 2013. Given the circumstances of the FCA's decision, we are taking our client's instructions and will revert as soon as practicable."

18. I observe again that the letter made no mention of any right on Mr Martin-Artajo's to make a reference, as a means of responding to the findings in the Final Notice.

19. Ms Cannon explained in her evidence why a reference was not made immediately after the Authority notified her of the discontinuance of the investigation. She took the view that given the sudden decision by the Authority, Mr Martin-Artajo was entitled to consider the options available to him and that the best forum to address the criticisms made of him was the Authority's investigation into his conduct, particularly as she had had recent confirmation (in October 2013) that the investigation was continuing after the Final Notice had been published.

20. Ms Cannon sought to understand the Authority's unexpected decision by asking for some explanation so that representations could be made on whether the investigation should be recommenced. This she did in her letter of 30 January 2014 to the Authority, which also stated that a reference was not made in October 2013 given a clear indication that the investigation was continuing and therefore that Mr Martin-Artajo would have an opportunity to respond to the allegations in the course of the investigation.

21. Ms Cannon, presumably as an explanation as to why there was a significant gap before following up on her letter of 23 December 2013, also said in her witness statement that the process of taking instructions was complicated by the fact that Mr Martin-Artajo was by then residing in Spain and subject to proceedings in multiple jurisdictions.

22. The Authority responded promptly to Ms Cannon's letter of 30 January 2014 on 5 February. It referred to the fact that the Authority could discontinue investigations at any time but declined to elaborate on the reasons given for the discontinuance beyond repeating the statements made in its letter of 16 December 2013. The Authority also referred to the right to make a third party reference under section 393 of FSMA whilst asserting that Mr Martin-Artajo was not identified in the Final Notice.

23. Ms Cannon sought in a letter dated 13 February 2014 an explanation as to what occurred after 18 October 2013 in connection with the US proceedings that resulted in the Authority's decision to discontinue the investigation and in particular whether the US authorities made any representations to the Authority to discontinue the investigation. Ms Cannon was of the view that the Authority might not have given sufficient attention to its responsibility as Mr Martin-Artajo's UK regulator and that it might have acted prematurely in abandoning its investigation in favour of proceedings overseas and that Mr Martin-Artajo was entitled to an explanation as to why the proceedings were discontinued so that may be assessed.

24. The Authority responded the next day and stated that it was not required to provide further details for the basis of the discontinuance and raised the confidentiality of its discussions with the US authorities as an issue.

25. In the light of this response, the question as to whether a judicial review of the decision to discontinue would be pursued as a route of obtaining further reasons was considered, but after taking Counsel's opinion Mr Martin-Artajo decided to proceed with a reference, a decision which was notified to the Authority on 4 March 2014.

The reference was lodged on 11 March 2014 and contained an application for an extension of time with an explanation for the delay. At no stage before this had Mr Martin-Artajo or his lawyers approached the Tribunal with a view to applying for an extension of time.

26. On 10 April 2014 the Tribunal released its decision on a preliminary issue in the case of *Achilles Macris v Financial Conduct Authority*, FS 2013/0010.

27. Mr Macris had made a reference on the basis that he had been identified in the Final Notice and criticisms were made of him in that notice such that he had the right to make a reference pursuant to section 393(11) of FSMA. Similar to the contentions made by Mr Martin-Artajo, Mr Macris complains of references to "CIO London Management" in the Final Notice. He contends that these references can only be taken to be references to him personally and consequently he had been identified in the Final Notice.

28. The Tribunal considered as a preliminary issue whether Mr Macris had been identified in the Final Notice. It concluded that he had been so identified and it being common ground that if he was identified then there were reasons in the Final Notice that were prejudicial to him, Mr Macris's reference was admitted. However, further proceedings on the reference have been stayed following the grant to the Authority of permission to appeal the decision to the Court of Appeal. It will be some months before the appeal can be heard.

The law and factors to be considered

29. If Mr Martin-Artajo has a right to make a reference it will arise out of section 393(11) FSMA which applies where neither a copy of the Warning Notice nor Decision Notice relating to the proceedings in which a third party maintains he has been prejudicially identified has (as in this case) been provided to him. This provides:

> "A person who alleges that a copy of the notice should have been given to him, but was not, may refer to the Tribunal the alleged failure and –
>
> (a) the decision in question, so far as is based on a reason of the kind mentioned in subsection (4); or
>
> (b) any opinion expressed by the regulator giving the notice in relation to him."

30. Mr Martin-Artajo accordingly made his reference pursuant to section 393(11).

31. Paragraph 2(2) of Schedule 3 to the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules") provides:

> "A reference notice must be received by the Upper Tribunal no later than 28 days after notice of the decision in respect of which the reference is made."

It is common ground that in this case, the 28 day period starts to run from 19 September 2013, the date the Final Notice was published.

32. Under its general case management powers the Tribunal has power to extend time for complying with a rule. Rule 5(3)(a) provides that the Upper Tribunal may:

> "… extend or shorten the time for complying with any rule …"

33. By virtue of Rule 2(3) (a), in exercising any power under the Rules the Tribunal must seek to give effect to the "overriding objective".

34. Rule 2(1) sets out the overriding objective as follows:

> "The overriding objective of these Rules is to enable the Upper Tribunal to deal with cases fairly and justly."

35. The factors which are included in the concept set out in Rule 2(1) are set out in Rule 2(2) as follows:

> "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Upper Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

It is therefore clear that the starting point is therefore the overriding objective and whether in all the circumstances it is fair and just to extend time.

36. Historically, when applying the overriding objective the Tribunal has had regard to the factors in the Civil Procedure Rules ("CPRs") applied by the High Court in considering whether to extend time.

37. In *Data Select Ltd v HMRC* [2012] UK 187 (TCC) Morgan J, sitting in the Upper Tribunal, confirmed that the approach of considering the overriding objective together with all the circumstances of the case, including the matters listed in CPR 3.9 is the correct one (see paragraph 37 of the Decision). At that time, CPR 3.9 set out a list of nine factors which the court was required to have regard to. Nevertheless, it was clear that Morgan J regarded those nine factors as being indicators to assist the Tribunal in applying the overriding objective and were not themselves to be regarded as incorporated by reference into the Tribunal's rules. He authoritatively set out in paragraph 34 of the Decision five questions which as a general rule a Tribunal was to ask itself when considering whether to extend time:

(1) What is the purpose of the time limit?

(2) How long was the delay?

(3) Is there a good explanation for the delay?

(4) What will be the consequences for the parties of an extension of time? and

(5) What will be the consequences for the parties of a refusal to extend time?

38. Since that decision, CPR 3.9 has changed and is now expressed in general terms as follows:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application for relief must be supported by evidence."

I observe that notwithstanding the emphasis on the need for litigation to be conducted efficiently and for compliance with rules to be enforced in substitution for the nine specific factors set out in the previous version of CPR 3.9, the rule repeats in sub-paragraph (1) what is the essence of the overriding objective, namely the need to deal justly with the application for relief from sanction in the light of all the circumstances of the case.

39. Nevertheless, in a recent Upper Tribunal decision, *McCarthy & Stone (Developments) Limited and others*, PTA/345/2013, applying the Court of Appeal decision in *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537, the Upper Tribunal said that while the CPRs do not govern proceedings in the Tribunals its principles are clearly to be respected. Judge Sinfield said at paragraphs 45 to 47 of the decision:

> "[45] The overriding objective does not require the time limits in those rules to be treated as flexible. I can see no reason why time limits in the UT Rules should be enforced any less rigidly than time limits in the CPR. In my view, the reasons given by the Court of Appeal in *Mitchell* for a stricter approach to time limits are as applicable to proceedings in the UT as to proceedings in courts subject to the CPR. I consider that the comments of the Court of Appeal in *Mitchell* on how the courts should apply the new approach to CPR 3.9 in practice are also useful guidance when deciding whether to grant an extension of time to a party who has failed to comply with a time limit in the UT Rules.
>
> [46] The new CPR 3.9 does not contain a long list of factors to be considered as the old one did. The new version now provides that the court will consider all the circumstances of the case to enable it to deal justly with the application including the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with rules, practice directions and orders.
>
> [47] As the Court of Appeal recognised in *Mitchell* at [49], regard must still be had to all the circumstances of the case but the other circumstances should be

given less weight than the two considerations which are specifically mentioned. In this case, applying the principles of the new CPR 3.9, as explained in *Mitchell* and *Durrant*, means that, in considering whether to grant relief from a sanction, I should take account of all the circumstances, including those listed in the old CPR 3.9, but I should give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with the UT Rules, direction and orders."

40. Although Judge Sinfield decided in this case to give greater weight to the need for litigation to be conducted efficiently and the need to enforce compliance with time limits than other factors, that may be seen as nothing more than a recognition that the time limit concerned must be given great respect, and there must be strong factors n favour of departing from it. It has always been the case that time limits should be respected unless there are good reasons not to, and time limits are there for a reason: generally speaking the parties are entitled to finality.

41. On that basis, *McCarthy and Stone* does not depart from the general principle that great respect must be given to time limits but serves as a reminder of that principle. Nevertheless, Judge Sinfield recognised, as the new version of CPR 3.9 does, that all the circumstances of the case must be considered and the decision to be made, as the Rules dictate, is whether in the circumstances of the case it is fair and just to extend the time limit.

42. This analysis is consistent with the recent Court of Appeal judgment in *Chartwell Estate Agents Limited v Fergies Properties SA* [2014] EWCA Civ 506, where the issue was, post *Mitchell*, whether the judge at first instance had been too lenient in granting relief from sanction with respect to a failure to serve witness statements on time. Davis LJ, having referred to the expectation that great weight be given to the factors in CPR 3.9(a) and (b), observed in paragraph 56 of his judgment that the judge had reached his conclusion to extend time on the basis that not to do so would be too severe a consequence when set against all the background factors. He then said at paragraph 57:

> "In my view, that background – that is, all the circumstances of the particular case – entitled the judge in this case to depart from the expectation which otherwise ordinarily would arise. It must not be overlooked that the Court of Appeal in *Mitchell* did not say that the two factors specified in CPR 3.9 will always prevail, as a matter of weight, over any other circumstances in a case where the default is not trivial and where there is no good justification. It is true that it later stated that the expectation is that the two factors mentioned in CPR 3.9 will "usually" trump other circumstances. But it did not say that they always will. That, with respect, must be right. It must be right just because CPR 3.9 has required that all the circumstances are to be taken into account and has required that the application be dealt with justly."

43. Accordingly, in my view since the decision to be made is whether it is fair and just to grant an extension of time and I must consider all the circumstances of the case in making that decision, as submitted by Mr Hall, the approach set out by Morgan J in posing the five questions he identified remains correct. In particular, the emphasis on

the importance of time limits can be given due weight in considering the answers to those questions.

44. I did not take Mr Stanley, who in his submissions accepted that there must be circumstances where the importance of the time limit is outweighed by other factors, to have a different view. Mr Stanley accepted that Morgan J in *Data Select* referred to CPR 3.9 as it then stood to identify the relevant factors to apply, which are encapsulated in the five questions he set out for the Tribunal considering the application to consider. In my view the fact that CPR 3.9 has changed gives no cause to revisit the underlying approach to be taken.

45. Aside from the five questions posed in *Data Select*, in my view there are two other factors that should be taken into account in this case.

46. First, as Mr Hall submitted, the Upper Tribunal is an integral part of the regulatory scheme under FSMA designed to ensure that regulatory action is preceded by a fair process. This was recognised by Moore-Bick LJ in *R (on the application of Wilford) v Financial Services Authority* [2013] EWCA Civ 677 where he described the respective roles of the Authority's administrative decision maker, the Regulatory Decisions Committee ("RDC"), and the Upper Tribunal in the following terms in paragraph 21 of his judgment:

> "Although the function of the RDC carries with it an obligation to act fairly and to give fair consideration to any representations made to it, the RDC remains an organ of the FSA and the giving of a Decision Notice is the final step in a disciplinary process conducted by the FSA.
>
> The statutory right to refer the matter to the Upper Tribunal enables the person subject to the disciplinary procedures to remove the matter from the sphere of the FSA for a fresh decision by an expert tribunal exercising a judicial function. That is the context in which the question falls to be decided. Although separate from the FSA both in terms of its constitution and function, the tribunal is nonetheless an integral part of the regulatory scheme established under the Act."

47. In this case, Mr Martin-Artajo has not been given the opportunity of making representations prior to the issue of the Final Notice, on the basis that the Authority took the view that he was not identified in the earlier warning and decision notices issued to JPM. Whether the Authority was correct to take that view will be a matter to be determined on this reference, if the reference is admitted out of time, but on the assumption that the Authority's view on that issue was incorrect then Mr Martin-Artajo would, if time were not extended, have had no opportunity at all of making representations on the criticisms he says were made of him in the Final Notice.

48. Mr Hall referred me to *Osborn v Parole Board* [2013] 3 WLR 102 where the Supreme Court referred to the purpose of procedural fairness. Lord Reed said at paragraph 67:

> "There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested."

49. There is also a public interest in the Authority's decision being as accurate as possible and this will be more likely to be achieved if those decisions are properly tested.

50. The lack of the opportunity for Mr Martin-Artajo to make representations and the role of the Tribunal as an integral part of the regulatory scheme designed to produce quality decision making are therefore additional factors that I should take into account.

51. Secondly, it is well established that regard should be had to the merits of Mr Martin-Artajo's reference. There would be no point extending time if I were of the view that the reference had no reasonable prospect of success. Conversely, if I was of the view that the reference had merit, that is a factor in favour of extending time.

Discussion

52. I now turn to consider whether I should extend time in the light of the facts found and the principles I have identified above. I do so by carrying out a balancing exercise in respect of those factors that tend to favour the grant of an extension and those which do not, giving appropriate weight to the various factors in the light of the facts found and coming to a conclusion as to whether as a result of that balancing exercise it is fair and just to grant an extension. I start by considering the five questions identified in *Data Select*.

The purpose of the time limit

53. Mr Stanley correctly summarised the reason for the time limit in respect of the filing of a reference in cases of this nature as follows:

(1) In relation to references generally (whether by the subject of the notice or a third party) the Authority needs to be able to take decisions, including decisions about whether to close an investigation (or some aspect of it), and how best to deploy investigation teams. Such decisions need to be taken in the light of accurate information about any aspects of the matter that are likely to be considered by the Tribunal.

(2) In relation to a reference by a third party (or alleged third party), interested parties (such as JPM as the subject of the Final Notice in this case) are potentially affected and they are entitled to know where they stand and to take action accordingly.

(3) The Tribunal's task may be made harder where there is delay in making a reference.

(4) It is in the public interest that the position should be clear, so that the market knows what regulatory action has been taken and when that action can be regarded as definitive.

54. It is therefore correct, as Mr Stanley submits, that in principle the time limit should be enforced and it should be regarded as a precise limit and not a vague target.

55. I deal with the impact on the Authority if the time limit were not respected below.

56. I place less importance on the position regarding JPM in this case. It is not suggested that whatever the outcome of Mr Martin-Artajo's reference, if admitted, it would result in a change in the terms of the Final Notice. JPM have achieved finality in relation to the regulatory outcome on their own particular case. In any event, if there is any uncertainty on this point, it already exists in relation to Mr Macris's reference and it does not appear to me that if Mr Martin-Artajo's reference were admitted that the position is materially worsened.

57. As far as the position of the Tribunal is concerned, its position would certainly be made harder if the delay was such that evidence became stale. In my view the period of delay in this case is not so long that this factor is a material issue in this case, and, as explained below, the fact that substantive progress on the reference is likely to be limited until FCA's current appeal in relation to Mr Macris's reference is determined minimises the significance of this point.

58. As far as the market is concerned, it is aware of the position regarding JPM. It is also aware that there is an ongoing investigation against Mr Macris; the fact that there may be some uncertainty regarding the position of Mr Martin-Artajo does not materially affect the position.

The length of the delay

59. The delay in this case (over four months) is not trivial or insignificant. As discussed below in relation to the reasons for the delay, there are periods where there was no progress on the matter which have not been convincingly explained. However, the impact of the delay is lessened by virtue of the fact that substantive progress on the reference, if admitted, is likely to be limited until determination of the Authority's appeal in *Macris.*

The explanation for the delay

60. As appears from the evidence, Mr Martin-Artajo, despite being aware of his potential right to make a reference, made, with the benefit of advice from a leading firm of lawyers, a deliberate decision not to make a reference until the question as to whether the Authority's investigation against him was to proceed had become clear. It is clear that he took a tactical decision that he would prefer the criticisms of his personal conduct that he perceived from the Final Notice to be addressed through the medium of the Authority's separate investigation against him and the subsequent decision making process rather than through the medium of proceedings in the Tribunal on a third party reference.

61. It is clear that when a third party is also the subject of an investigation then he has a dilemma as to whether to focus on his efforts to clear his name through the investigation or to institute Tribunal proceedings, with the attendant expense. It is of course open for the third party to "hedge his bets" by making a reference and seeking

a stay whilst the investigation proceeds. The filing of a reference notice is not an onerous task and can be completed relatively easily.

62. Mr Martin-Artajo did not take that alternative course; Mr Hall submitted that it was a perfectly reasonable course of action to rely on the investigation process when the Final Notice was published on the basis that the Authority had a duty (as expressed in paragraph 4.13 of the Authority's Enforcement Guide) to have an ongoing dialogue with Mr Martin-Artajo throughout the investigative process.

63. Mr Hall submitted that when Ms Howard confirmed on 18 October 2013 that the investigation was progressing Mr Martin-Artajo then had a good reason for not making a reference at that point. Mr Hall submitted that in the light of the Final Notice, there was every reason to conclude that the Authority had formed a conclusion in relation to its investigation of Mr Martin-Artajo and would soon be issuing him with a Warning Notice.

64. In my view it was not reasonable to conclude that a Warning Notice was imminent. As Norton Rose Fulbright would have known, before a Warning Notice was issued a preliminary findings letter could be expected, following which discussions may have been opened with a view to a settlement before regulatory proceedings commenced. There was nothing in the terms of the conversation with Ms Howard that indicated that even a preliminary findings letter was imminent, let alone a Warning Notice. Her reply to the enquiry was entirely non-committal.

65. By this point the 28 day period had already expired. Ms Cannon had not mentioned in her letter of 15 October 2013 that the reason for the request for an update was because Mr Martin-Artajo was contemplating the making of a reference if the investigation was not proceeding, so the Authority was unaware of Mr Martin-Artajo's dilemma. There are two possible assumptions that can be made from this approach; either Mr Martin-Artajo had taken the view that although aware of the time limit (which he clearly was) he would take the risk of having to seek an extension of time to file his reference, or that he assumed it was not a risk because in due course if the investigation did not proceed he would pursue the alternative remedy of a third party reference and time would be extended as a matter of routine.

66. I therefore have some sympathy with Mr Stanley's observation that Mr Martin-Artajo had made his own bed and he had to lie in it. In my view, although I accept that it is easy to be critical with the benefit of hindsight, having received no indication that the investigation would proceed to regulatory proceedings at an early stage, Mr Martin-Artajo could either have made a reference and asked for a stay, or he could have explored with the Authority whether they would consent to an extension of time to file a reference whilst the position on the investigation became clearer and ask the Tribunal to approve such an extension. If it became clear that the Authority was unsympathetic to an extension (which ultimately proved to be the case) then if he was still of the view that he preferred the matter to be dealt with through the investigation but did not wish to take the risk that time would not be extended before the Tribunal then he could have applied to the Tribunal on his own for an extension of time.

67. It was over a month before Norton Rose Fulbright again sought an update on the investigation in their letter of 29 November 2013 and as I have found, this letter did not refer specifically to the fact that Mr Martin-Artajo believed he had the right to make a reference.

68. Mr Hall is critical of the fact that shortly following this letter, on 16 December 2013, the notice of the discontinuance of investigation came as "a bolt out of the blue". He says that this indicates a breach of the Authority's duty under the Enforcement Guide to have an ongoing dialogue with Mr Martin-Artajo as to the progress of the investigation.

69. In my view it would be somewhat harsh to be over critical of the Authority's reticence over the progress of the investigation at a time when they must clearly have been considering whether to discontinue it in the light of their discussions with the US authorities, discussions which for obvious reasons would have had to have remained confidential. It is a difficult balancing act for the Authority to perform between not being inappropriately open about their discussions and keeping the subject of the investigation informed. Equally, Norton Rose Fulbright must have appreciated that there can be no guarantee that an investigation would not be terminated at any time, and indeed they did not seek any assurances in that regard when the decision was made not to make a reference, based on their assumption that the investigation was ongoing and would be carried through to regulatory proceedings.

70. Nevertheless, I accept that the discontinuance of the investigation did come as a surprise and it was reasonable for Mr Martin-Artajo to take stock at that point and take a short period of time to consider his options.

71. However, I cannot accept that it was reasonable to have taken over a month to request reasons for the discontinuance which was made in Ms Cannon's letter of 30 January 2014. The delay cannot be explained simply on the basis of Mr Martin-Artajo's residence in Spain or the fact of ongoing proceedings in multiple jurisdictions.

72. There was then delay of nearly a month from when the Authority made it clear in its letter of 14 February 2014 that it would not provide any further reasons for the discontinuance before the reference was filed on 11 March 2014. This is explained on the basis that advice on whether to seek a judicial review of the decision not to give further reasons was then sought and it might prejudice the chances of obtaining leave to pursue a judicial review if the statutory remedy of making a reference were pursued.

73. I did not receive detailed submissions on the latter point, but at this stage it must have been apparent that there was now a significant delay since the time limit had expired so that at least the Tribunal could have been approached with an application to extend time without actually making the reference.

74. My overall conclusion on the reasons for the delay are that whilst it was reasonable to pursue the investigation route first before making a reference,

insufficient steps were taken to manage the process by taking more proactive steps with regard to minimising the risk that an extension of time would not be granted, such as being more open with the Authority about the reason why it was important to know how the investigation was progressing and seeking to negotiate an extension of time. I have formed the impression that Mr Martin-Artajo and his advisers did not take the importance of time limit seriously enough and take steps to mitigate the delays that inevitably built up.

75. On that basis, in my view the reasons for the delay whilst having some merit, are not sufficiently strong on their own to justify an extension of time bearing in mind the way in which the matter was managed. It will therefore be necessary to consider whether the other circumstances are sufficiently strong to enable a conclusion to be reached that it is fair and just to extend time.

The consequences for the parties of an extension of time

76. Should an extension of time be granted, Mr Martin-Artajo will have the opportunity for the first time to make representations on the Final Notice, subject to it being determined that he has the right to make a reference. This will also assist with regard to the wider consideration that I identified of there being a public interest in the accuracy of administrative decision making.

77. I have also indentified the merits of the reference as being a relevant consideration. There is no benefit in admitting an unmeritorious reference out of time. Mr Stanley submitted that there is a distinction between the basis on which Mr Macris and Mr Martin-Artajo are seeking to make references, the former because he contends he was identified through being referred to in the Final Notice as "CIO London Management", the latter because he contends he was identified through being referred to as "SCP Management". Mr Stanley submits that Mr Martin-Artajo's reference should be regarded as free-standing because he takes issue with different points on the Final Notice than those taken by Mr Macris and the conclusion on whether either has been identified could therefore be different.

78. In my view this is a distinction without a difference; Mr Macris was able to persuade the Tribunal that he had been identified in the Final Notice and that there was therefore merit in his reference. On the basis of that decision (although it is of course subject to appeal) it must be accepted that Mr Martin-Artajo has a realistic prospect of persuading the Tribunal that he has likewise been identified and that his reference has merit. The consequences for Mr Martin-Artajo of extending time will therefore be the admission of a reference that has merit.

79. The Authority will not be able to close its file on the "London Whale" issue which was the subject of the Final Notice if the reference is admitted and will therefore have to devote resources that it might have allocated elsewhere to dealing with the matter. This is a powerful point and as I have already identified finality of litigation is normally to be given strong weight.

80. However, in my view this point carries less weight in the circumstances of this case in that the Authority still has to regard the London Whale matter as open. I received no evidence from the Authority that any different resource has been allocated to dealing with Mr Martin-Artajo's reference to that dealing with Mr Macris. It is reasonable to assume that the same team would be dealing with both matters.

The consequences for the parties of a refusal to extend time

81. If time is not extended, Mr Martin-Artajo will have no opportunity to challenge the criticisms he says are made of him in the Final Notice, bearing in mind that the investigation against him was discontinued and he was not given the opportunity of making representations as a third party under section 393 FSMA in the course of the proceedings taken against JPM.

82. Mr Stanley submits that the loss of this right of challenge is always a consequence when a time limit is not respected and that was always known by Mr Martin-Artajo and his advisers; the very purpose of the time limit is to ensure that there is finality of litigation if it is not respected.

83. I accept that submission to a point, but clearly it can be outweighed by the other circumstances prevailing, otherwise there would be no provision allowing for an extension. The fact that Mr Martin-Artajo was not given a right to make representations (accepting that the question as to whether he should have been is an open issue) is a significant factor in this regard, taking account also of the observations of Moore-Bick LJ in *Wilford* as to the position of the Tribunal in the regulatory scheme.

84. If time is not extended, it is correct that the Authority will have some resource benefits in not having to face Mr Martin-Artajo's challenge. However, as noted by Mr Hall, it has filed no evidence which shows any degree of resource prejudice or to establish prejudice of any kind. In addition, as identified above, any prejudice that may be suffered is minimised as a result of Mr Macris's reference remaining open.

85. It is therefore clear to me that the balancing exercise in relation to the consequences for each party if time is extended or not comes out in favour of Mr Martin-Artajo.

Conclusion

86. Applying the overriding objective in the light of all of the factors considered above, I have concluded that the balancing exercise comes out in favour of granting an extension of time for the following reasons:

(1) Whilst the importance of time limit is recognised, it is lessened in this case because of the lack of significant prejudice to the party it is designed to protect, the Authority, because of Mr Macris's ongoing reference.

(2) Whilst the delay is significant, it will make no material difference to efficiency of disposing of the litigation. In the light of the similarity of

the subject matter of Mr Macris's reference, in respect of which in essence the same preliminary issue arises and which is being considered by the Court of Appeal, it is appropriate to stay proceedings on Mr Martin-Artajo's reference until the Court of Appeal's decision is released.

(3) Bearing in mind the public interest considerations and the fact that Mr Martin-Artajo has not previously had the opportunity of making representations, the prejudice to Mr Martin-Artajo in not extending time clearly outweighs the prejudice to the Authority if time is not extended.

(4) The above factors are powerful enough in the circumstances of this case to outweigh the fact that I have not found the reasons for the delay compelling. I have also taken into account the fact that at all times Mr Martin-Artajo acted in good faith upon the professional advice of a leading law firm and there has been a degree of hindsight in my observations that the matter might have been handled differently. In my view it would be too severe a consequence in all the circumstances and unfair to Mr Martin-Artajo to refuse to extend time.

87. I therefore conclude that it is in the interests of justice that time for the making of the reference be extended and accordingly it is admitted.

88. I direct that all further proceedings on the reference are stayed until the release of the decision of the Court of Appeal on the preliminary issue in the case of *Macris v Financial Conduct Authority.*

TIMOTHY HERRINGTON
UPPER TRIBUNAL JUDGE

RELEASE DATE: 11 July 2014